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1 {York Stenographic Services, Inc.}

2 RPTS BROWN

3 HIF098.170

4 TROLLING FOR A SOLUTION:

5 ENDING ABUSIVE PATENT DEMAND LETTERS

6 TUESDAY, APRIL 8, 2014

7 House of Representatives,

8 Subcommittee on Commerce, Manufacturing, and Trade,

9 Committee on Energy and Commerce

10 Washington, D.C.

11 The Subcommittee met, pursuant to call, at 10:05 a.m.,  
12 in Room 2123 of the Rayburn House Office Building, Hon. Lee  
13 Terry [Chairman of the Subcommittee] presiding.

14 Members present: Representatives Terry, Lance, Olson,  
15 McKinley, Kinzinger, Bilirakis, Johnson, Long, Schakowsky,  
16 McNerney, Welch, Rush, Matheson, and Barrow.

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17           Staff present: Charlotte Baker, Deputy Communications  
18 Director; Kirby Howard, Legislative Clerk; Brian McCullough,  
19 Senior Professional Staff Member, CMT; Paul Nagle, Chief  
20 Counsel, CMT; Shannon Weinberg Taylor, Counsel, CMT; Graham  
21 Dufault, CMT; Michelle Ash, Democratic Chief Counsel; and  
22 Will Wallace, Democratic Professional Staff Member.

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|  
23           Mr. {Terry.} We are going to go ahead and start, and I  
24 want to thank our witnesses. This is Paul's first time in  
25 the chair replacing Gib Mullen, so, Paul, thank you for your  
26 good work. I just want to let people know, or the witnesses,  
27 I appreciate you coming here today, and one of them,  
28 extraordinary circumstances, Mr. Brouillard, who actually  
29 could have attended the NCAA final game last night, and is a  
30 UConn fan, and from Connecticut. So that is a bigger  
31 sacrifice than we usually encounter here.

32           Mr. {Brouillard.} I gave my tickets up to be here, Mr.  
33 Chairman.

34           Mr. {Terry.} Yes. Now some of us are doubting your  
35 ability to make good decisions. But we are thankful that you  
36 did that. And I will introduce all of you before we actually  
37 start your testimony, and so now I am going to start my  
38 opening statement.

39           And good morning, and welcome, everyone, to today's  
40 hearing, called, ``Trolling for a Solution, Ending Abusive  
41 Patent Demand Letters''. As Thomas Edison once said, to  
42 invent you need a good imagination and a pile of junk. That

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43 may be true, but I would also add that you also need to fight  
44 for your invention because, as Thomas Moore said, it is  
45 naturally given to all men to esteem their own inventions  
46 best.

47 Now, in competition of ideas, whether we are talking  
48 about a multinational company that spends \$8 million per day  
49 on R and D, or an inventor with a workshop in his basement,  
50 the Constitution treats intellectual property equally. So  
51 let me start by saying that we must respect the arrangement  
52 small inventors need in order to enforce their patent rights.  
53 And while we are at it, let us emphasize that not all patent  
54 assertion entities are trolls. The role of patent assertion  
55 entities is very important for small inventors who lack the  
56 resources to enforce his or her own property rights. Taking  
57 away or degradating the flexibility to assign enforcement  
58 rights would do nothing less than encroach on an inventor's  
59 Constitutional right to exclude others from infringing their  
60 property rights.

61 With that said, what we address today are instances  
62 where bad actors extort money from innocent parties under the  
63 pretense of asserting intellectual property rights. This

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64 kind of activity belongs in the same family as other type of  
65 unfair and deceptive trade practices. Our job is to separate  
66 it from legitimate right assertions. In order to do so, we  
67 have here today a diverse panel of witnesses whose testimony  
68 gives us a variety of perspectives on the issue.

69       Already we are seeing a set of potentially conflicting  
70 considerations. First, patent enforcement differs across  
71 industries. According to UNeMed testimony, it considers  
72 listing patent claims and demand letters to be standard  
73 procedure. Caterpillar, on the other hand, would find it  
74 difficult in some situations to list the exact claim at issue  
75 because it often lacks access to the potentially infringing  
76 product.

77       Second, some argue that we should only address letters  
78 sent to end-users of patents. Now, this may fail to address  
79 situations like the one in UNeMed's testimony, where a small  
80 inventor was slapped with an abusive demand letter just after  
81 clearing an FDA approval process. Even so, the majority of  
82 complaints on this issue appear to come from the end-users  
83 who are not versed in patent law.

84       I will not exhaust the issues before us today, but I

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85 want to clarify one thing. Some may say that legislative  
86 action to curb abusive demand letters would devalue  
87 intellectual property rights generally. I disagree. In  
88 fact, it remains that these bad actors are arrogantly  
89 manipulating the intellectual property system and getting  
90 away with it. Several state Attorney Generals, including  
91 John Bruning of Nebraska, have brought suits under their  
92 consumer protection statutes tools, and thus have far proven  
93 difficult to use. As a result, many states are working  
94 rapidly to update their laws.

95       There is something to be done here, and in order to get  
96 it right we will need the assistance of all of the  
97 stakeholders and witnesses here before us today, and I thank  
98 the witnesses for being here.

99       [The prepared statement of Mr. Terry follows:]

100 \*\*\*\*\* COMMITTEE INSERT \*\*\*\*\*

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|

101           Mr. {Terry.} Have one minute. Does anybody want it?  
102   Hearing none, I yield back my time, and recognize the Ranking  
103   Member of our subcommittee, Ms. Schakowsky.

104           Ms. {Schakowsky.} Thank you, Mr. Chairman, for holding  
105   this important hearing on patent assertion entities, also  
106   known as patent trolls. And like you, I want to develop a  
107   solution to this growing issue, and look forward to doing so  
108   in a bipartisan manner.

109           Trolls assert that the patents they hold have been  
110   infringed upon, sending vague and threatening letters to  
111   hundreds, or even thousands of end-users of products,  
112   typically small businesses or entrepreneurs. Those  
113   businesses are told that they can pay the patent troll to  
114   continue using the technology. Considering the cost and  
115   resources needed to vet and fight a patent infringement  
116   claim, may small businesses choose to settle the claim by  
117   paying the troll. Others investigate and fight the claims,  
118   draining precious resources, and stunting the growth of their  
119   businesses.

120           It costs patent trolls virtually nothing to send patent

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121 demand letters, but it can be incredibly lucrative, and  
122 business is booming. In 2011 patent troll costs U.S.  
123 businesses an estimated \$29 billion, and the number of  
124 defendants in patent infringement lawsuits increased about  
125 130 percent from 2007 to 2011, according to the Government  
126 Accountability Office. At best, patent trolls are  
127 misleading. At worst, they are extortionists. This is  
128 fundamentally a fairness issue. As the subcommittee charged  
129 with protecting consumers and promising fair business  
130 practices, we must take action to reduce frivolous patent  
131 claims.

132 I am glad that the FTC, the Federal Trade Commission, is  
133 using its existing authority to better understand the nature  
134 of patent assertion entities, and the demand letters that  
135 they issue. I look forward to the commission's analysis,  
136 which I believe will be instructive as we decide how to curb  
137 trolling.

138 Nonetheless, while we wait for the FTC review, there are  
139 steps that we can, and should, take now to combat patent  
140 trolls. I believe there should be more transparency and  
141 minimum standards established for patent demand letters.

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142 There are many ideas about how to increase transparency,  
143 including proposals to require the public disclosure of  
144 egregious patent demand letters. There are also suggestions  
145 as to the minimum information that should be included in a  
146 patent demand letter, including the patent allegedly  
147 infringed, and the technology used that allegedly infringes  
148 on the patent.

149       However, it is vitally important that we approach this  
150 issue with the recognition that many patent infringement  
151 claims are reasonable efforts to protect intellectual  
152 property. We also need to be careful to make sure that  
153 universities, research institutions, and others that develop  
154 and hold patents, but may not develop products for sale, are  
155 not labeled as trolls. In fighting trolls, we shouldn't  
156 undermine the ability of innovators to develop and defend  
157 their patents.

158       While our witnesses today come at this issue from a wide  
159 variety of perspectives, it was interesting to read in their  
160 prepared testimony that each believes that this is an issue  
161 in need of attention. The details of whatever legislation  
162 this committee puts forth will be incredibly important, but

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163 the fact that our witnesses unanimously agree that we have a  
164 problem is an important start. I look forward to hearing  
165 their perspective about how legislation should be structured  
166 to make sure that patent demand letters are more fair and  
167 transparent moving forward.

168 Again, thank you for holding this hearing today, Mr.  
169 Chairman. I yield the remainder of my time to Mr. Welch.

170 [The prepared statement of Ms. Schakowsky follows:]

171 \*\*\*\*\* COMMITTEE INSERT \*\*\*\*\*

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172           Mr. {Welch.} Thank you very much. I am getting the  
173 opportunity to introduce our Attorney General in Vermont, and  
174 we are very proud of Bill Sorrell for the leadership that you  
175 have provided, and also the other panelists too. This is an  
176 incredible issue, and Bill Sorrell was very responsive to a  
177 lot of the folks, that range from businesses that got these  
178 unbelievable stick-up letters, to non-profits, where these  
179 parents had raised money in the community to set up a group  
180 home for disabled kids, and next thing you know, their  
181 threadbare budget is being threatened by these letters,  
182 demanding payment for--they couldn't figure it out.

183           And, Bill, you worked with Jerry Tarrant and others with  
184 our legal community there. It was very responsive, and you  
185 are working with your fellow Attorney Generals. Mr. Chair,  
186 our Attorney General was the former head of the Attorney  
187 Generals. He has received numerous awards. I am not going  
188 to bore everybody with what they are, but I will tell you  
189 they are good, and a lot of us wish we had them as well.  
190 Leader in tobacco legislation, Humane Society issues,  
191 champion for kids, taking the fight about prescription drug

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192 medication abuse, and abuse of drugs in our state. So it is  
193 great to have Bill Sorrell here, and it is great to have you  
194 on the patent troll issue, and we look forward to working  
195 together to try to deal with this. Thank you. I yield back.  
196 Thank you, Ranking Member Schakowsky.

197 Ms. {Schakowsky.} And I yield back.

198 [The prepared statement of Mr. Welch follows:]

199 \*\*\*\*\* COMMITTEE INSERT \*\*\*\*\*

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200           Mr. {Terry.} All right. Does anyone on the Republican  
201 side want time? I have to talk slow to draw this out.  
202 Anybody want to talk about the game? All right. Seeing  
203 none, no one taking our time, then, Mr. McNerney, you are our  
204 resident patent holder. Would you like the minority's time?

205           Mr. {McNerney.} I sure would.

206           Mr. {Terry.} But you are the only one. You are the  
207 expert.

208           Mr. {McNerney.} I thank you, Mr. Chairman.

209           Mr. {Terry.} You are recognized for 5 minutes.

210           Mr. {McNerney.} I appreciate your calling this hearing.  
211 You know, if you hang around here for long enough, you see  
212 the advertisements in the Hill rags about patent trolls  
213 taking more and more money over time, and those will get your  
214 attention. If you take the Metro, you see, every so often at  
215 the Metro stops, big advertisements, so this is clearly an  
216 issue. The fact that the so-called patent trolls are  
217 demanding stick-up letters, as my friend from Vermont said,  
218 it is an issue. We need to address it. There is a general  
219 understanding that this is a problem, and I am glad to see

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220 this come up in a hearing so that we can hear your inputs,  
221 how we can move forward together, how we can best address  
222 this issue.

223 As the Chairman said, I have patents. One of them is a  
224 Fat Wire patent, and the other software patent, so I kind of  
225 understand where we could be with this issue. I understand,  
226 as a small patent holder, how difficult it would be to assert  
227 your rights against a large corporation, if that comes to  
228 that.

229 So there is a place for patent assertion entities. I  
230 want to see that preserved, but we want to see that the sort  
231 of stick-up nature of this is curtailed, so it is a balance.  
232 It is important to have a well thought out and meaningful  
233 bipartisan discussion, and I think, on this particular issue,  
234 we have a good desire to work on a bipartisan basis.

235 So we have an opportunity to make it better, and I am  
236 hoping to be a part of that. I am hoping that your testimony  
237 can help guide us on the decisions that we need to make. So,  
238 with that, I am going to yield back, Mr. Chairman.

239 [The prepared statement of Mr. McNerney follows:]

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240 \*\*\*\*\* COMMITTEE INSERT \*\*\*\*\*

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241 Mr. {Terry.} Anyone else? All right. So Mr. Schultz--

242 Ms. {Schakowsky.} Would either of the other members of

243 the committee--no? Okay. Mr. Matheson or Mr. Barrow? No?

244 Okay. Thank you.

245 Mr. {Terry.} Gentlelady yields back, and so I want to

246 introduce our panel now. Bill Sorrell is one of our resident

247 expert witnesses from the AG's office, and we appreciate you

248 being here today. For those of you who haven't testified

249 before us, we go stage left to right, so, Mr. Sorrell, as

250 Attorney General of Vermont, will go first.

251 Then we now have Mr. Bouillard, the person who gave up

252 his tickets last night to be here, and your sacrifice is

253 massive, and well appreciated. You represent the Savings

254 Institute Bank and Trust Company on behalf of the American

255 Bankers Association. Then, next to him, Mr. Skarvan is

256 Deputy General Counsel, Intellectual Property for

257 Caterpillar. Appreciate your appearance.

258 Then Mr. Schultz, or as we call him, Jason ``Just In

259 Time'' Schultz, Associate Professor of Clinical Law, New York

260 University School of Law, and we understand it has been a

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261 difficult morning for you, and we appreciate that you  
262 undertook these heroic efforts to get here today. Thank you.

263 Then we have Mr. Mark Chandler, Senior Vice President  
264 and Chief Compliance Officer of Cisco Systems, who has great  
265 experience with these type of demand letters.

266 Then, last, Mr. Michael Dixon, Ph.D. Dr. Dixon is  
267 President and CEO of UNeMed Corporation, University of  
268 Nebraska's holding business of all of the patents generated  
269 by the University.

270 So, at this time, Mr. Sorrell, you are recognized for  
271 your 5 minutes.

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272 ^STATEMENTS OF THE HONORABLE WILLIAM SORRELL, ATTORNEY  
273 GENERAL, STATE OF VERMONT; RHEO BROUILLARD, PRESIDENT AND  
274 CEO, SAVINGS INSTITUTE BANK AND TRUST COMPANY, ON BEHALF OF  
275 AMERICAN BANKERS ASSOCIATION; DENNIS SKARVAN, DEPUTY GENERAL  
276 COUNSEL, INTELLECTUAL PROPERTY GROUP, ON BEHALF OF COALITION  
277 FOR 21<sup>ST</sup> CENTURY PATENT REFORM; JASON SCHULTZ, ASSOCIATE  
278 PROFESSOR OF CLINICAL LAW, NEW YORK UNIVERSITY SCHOOL OF LAW;  
279 MARK CHANDLER, SENIOR VICE PRESIDENT AND CHIEF COMPLIANCE  
280 OFFICER, CISCO SYSTEMS INCORPORATED; AND MICHAEL DIXON,  
281 PH.D., PRESIDENT AND CEO, UNEMED CORPORATION.

|

282 ^STATEMENT OF WILLIAM SORRELL

283 } Mr. {Sorrell.} Thank you, Mr. Chairman, Ranking Member  
284 Schakowsky, members of the subcommittee. Thank you much for  
285 the opportunity to appear today and speak about an issue that  
286 is of great importance to the Nation's Attorneys General, as  
287 evidenced by the fact that 42 offices signed on to a sign-on  
288 letter that we sent to the Senate drafted by General Buling  
289 and myself in February on these issues. Much of the work in

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290 the House and in the Senate on assertions of patent  
291 infringement have related to abusive litigation tactics, but  
292 the truth of the matter is that is just the tip of the  
293 iceberg, and I want to talk some today about the iceberg, the  
294 roughly as much as 99 percent of cases that don't result in  
295 the filing of a civil complaint.

296       And so I want to talk about, for example, Lincoln  
297 Street, Inc., a small nonprofit in Springfield, Vermont with  
298 16 direct care workers, 12 or 13 administration and support  
299 staff, that provide home care to developmentally disabled  
300 Vermonsters. In the fall of 2012, Lincoln Street received a  
301 letter from one of the roughly 40 shell subsidiary  
302 corporations of a parent corporation by the name of MPHJ  
303 Technology Investments, LLC. Paraphrasing, the letter says,  
304 we own patents X and Y, we believe you are in violation of  
305 them, and that you are scanning documents and sending those  
306 in e-mail through a computer network. Please be in touch  
307 with us within 2 weeks and prove to us that you are not  
308 infringing our patent, or talk to us about resolving this,  
309 and paying licensing fees to us. We have had a very positive  
310 response around the country from the business community, many

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311 companies agreeing to pay us \$1,000 per employee.

312         A couple weeks later, a second letter comes, this time  
313 from a Texas law firm by the name of Farney Daniels says, we  
314 have been retained because you didn't respond to the first  
315 letter. This is serious. We hope that we don't have to get  
316 to litigation, but unless you are in touch with us forthwith  
317 and resolve this amicably, it is going to be trouble, please  
318 take this serious. And then there is the third letter a  
319 couple weeks later, also from Farney Daniels. This one  
320 attaches a draft, Federal Court Complaint, against the  
321 recipient of the letter, and says that, if you don't resolve  
322 this with us within 2 weeks, we will, ``be forced to file a  
323 complaint against you.'' If you are not in touch with us in  
324 2 weeks, ``litigation will ensue otherwise.''

325         Well, it wasn't just Lincoln Street that received that  
326 letter in the fall of 2012. We ultimately learned that 75  
327 small businesses and nonprofits in the state received letters  
328 from one or other of the shell subsidiaries. And when we  
329 filed the first of its kind in the nation lawsuit in the  
330 spring of 2013 against MPHJ, as of that time, not one lawsuit  
331 had been filed in Vermont, nor had, to our knowledge, a

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332 lawsuit been filed by MPHJ, or any of its shell subsidiaries,  
333 anywhere in the country. The Federal Trade Commission, in a  
334 draft complaint against MPHJ, has looked outside Vermont, and  
335 in its draft complaint says that one of the 80 or more shell  
336 subsidiaries of MPHJ sent demand letters to 16,450 small  
337 businesses and nonprofits in all 50 states in this country.

338         So that is part of the iceberg. Rest of the iceberg, or  
339 other parts of the iceberg, are demand letters to smaller  
340 financial institutions saying, your ATMs use the web, they  
341 are in violation of our patent. Others go to local coffee  
342 houses that have free Wi-Fi, we have patents, you are in  
343 violation of those, please pay up.

344         We filed our lawsuit in State Court. We were  
345 immediately removed to Federal Court, and MPHJ has said, one,  
346 we are totally pre-empted, because this is a patent matter.  
347 You can't be enforcing your State Consumer Protection Acts  
348 against us. And, second of all, you lack personal  
349 jurisdiction over us because all we have simply done is  
350 asserted patent infringement, and that doesn't subject us to  
351 personal jurisdiction.

352         We also enacted in Vermont a statute on bad faith

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353 assertions of patent infringement at the request of various  
354 well known Vermont companies, and Utah, Virginia, Wisconsin,  
355 and Oregon have followed suit and adopted their own statutes.  
356 There are many others considering it. We hope that the  
357 Congress will take action, have more transparency in this  
358 arena, and evidence at the time of the assertion of patent  
359 infringement of any other proceedings or court matters that  
360 have ruled upon the patents in question. We want express  
361 statements that the states are not pre-empted, and that we  
362 have personal jurisdiction for those that blanket our states  
363 with these assertions of patent infringement.

364 I have got 21 seconds left, but--sorry, I read it wrong.  
365 Thank you very much.

366 [The prepared statement of Mr. Sorrell follows:]

367 \*\*\*\*\* INSERT A \*\*\*\*\*

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368           Mr. {Terry.} Thank you, Bill.

369           Mr. Brouillard, you are now recognized for your 5

370 minutes.

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371 ^STATEMENT OF RHEO BROUILLARD

372 } Mr. {Brouillard.} Thank you, Mr. Chairman, and Ranking  
373 Member Schakowsky. Thank you again for giving us the chance  
374 to come and present our information to you today. My bank is  
375 a \$1.3 billion community bank that has been established since  
376 1842. We serve Connecticut, and parts of Rhode Island.

377 Obviously, the U.S. has a robust patent system which  
378 protects the rights of legitimate patent holders, and we  
379 believe those rights should continue to be protected. Patent  
380 trolls, however, as we have heard, abuse this system, and are  
381 serious threats to small businesses, banks, and credit unions  
382 throughout the country.

383 For the cost of postage, a little stationary, and some  
384 time, these trolls use unscrupulous tactics to extort  
385 licensing fees from companies too small to pay the cost to  
386 defend themselves. The claims are often intentionally vague,  
387 and based on shaky legal standing. However, when confronted  
388 with threats of expensive litigation, many banks, especially  
389 smaller ones, find that their only option is to settle,

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390 rather than paying the millions of dollars it may cost to  
391 defend against extortive claims of patent infringement.

392 I have seen this firsthand at my bank. In January 2013  
393 a patent troll targeted my bank with a very vague letter, one  
394 page, claiming that they had conducted an investigation, and  
395 that our ATMs operated in a way that infringed upon their  
396 patents. Their letter included an exhibit which listed 13  
397 patent numbers, purported to be patent numbers. So we had a  
398 list of 13 seven digit numbers. That was the extent of the  
399 information provided. They demanded a sublicensing  
400 agreement, and, as Attorney General Sorrell indicated, we had  
401 two weeks to comply. 30 other banks in Connecticut received  
402 that same vague notice, one of which included a bank that did  
403 not even have any ATMs, so there was obviously no  
404 investigation ever conducted.

405 The pattern of these trolls is to send demand letters,  
406 threaten, or even file, lawsuits, and require a response  
407 within a short period of time. By forcing these settlements,  
408 they use these actions to intimidate their other targets. In  
409 fact, two years before we received our demand letter, this  
410 same troll brought suits in other New England states, and,

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411 because of fear and lack of resources, over 100 banks quickly  
412 settled. The following year, 80 letters were sent to Maine  
413 and Massachusetts banks. They too ultimately settled.

414 All of these letters were mailed, in fact, after a  
415 Federal Circuit Court upheld a lower court ruling  
416 invalidating the primary patent. Many of these banks ended  
417 up settling and paying their so-called sublicensing fee, as  
418 opposed to contesting the issue, because of the cost. In  
419 some respect, in Connecticut, we were lucky. We had learned  
420 about the troll having done its work earlier in the other New  
421 England states, and we also had the advantage of hearing  
422 about some of the rulings that were coming out of the courts  
423 against this particular troll.

424 For my bank, the cost would have been \$27,000, which at  
425 the time represented about 10 percent of monthly earnings for  
426 the bank. For the 30 Connecticut banks targeted, had we paid  
427 together, the amount would have been in excess of \$300,000.  
428 Even though the courts have invalidated the patents, this has  
429 not stopped this particular troll from sending demand  
430 letters, and bringing legal action against other banks in  
431 other states. I am aware that there have been additional

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432 suits filed even this year in New York and New Jersey. We  
433 thank Congress for seriously addressing this issue, and  
434 commend the House for passing H.R. 3309, the Innovation Act,  
435 which begins to address the issue, but we feel this is just  
436 the first step, and more can be done.

437 Chief among these is to require transparency in all  
438 allegations of a patent infringement, including details about  
439 the patent, how the target firm is infringing on it, who the  
440 real owner of the patent is, and whether the patent has  
441 expired, or been invalidated. This would help put an end to  
442 some of the abuses, while protecting legitimate patent  
443 holders. Other requirements we recommend include a registry  
444 of demand letters, and requiring bad actors to reimburse the  
445 small businesses for all fees and costs, including the costs  
446 to defend themselves.

447 Vendors who supply technology and equipment should be  
448 made to defend their products against patent infringement  
449 claims. Many contracts today specifically exclude such a  
450 role, and small businesses are often not in a position to  
451 force changes in that language.

452 In summary, the problem with patent trolls is widespread

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453 and getting worse, while the number of demand letters rises  
454 sharply each year. Fighting these trolls has a real cost,  
455 and we certainly urge Congress to take action to stop patent  
456 trolls, and protect small businesses from the enormous cost  
457 of abusive lawsuits. Thank you.

458 [The prepared statement of Mr. Brouillard follows:]

459 \*\*\*\*\* INSERT B \*\*\*\*\*

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|

460           Mr. {Terry.} Thank you.

461           Mr. Skarvan, you are now recognized for your 5 minutes.

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|

462 ^STATEMENT OF DENNIS SKARVAN

463 } Mr. {Skarvan.} Thank you, Mr. Chairman, Ranking Member  
464 Schakowsky, and members of the subcommittee. I am testifying  
465 today on behalf of the Coalition for 21st Century Patent  
466 Reform, or 21C, a broad and diverse group of nearly 50  
467 corporations, including 3M, Caterpillar, Eli Lilly, General  
468 Electric, Proctor and Gamble, and Johnson and Johnson. For  
469 more than 100 years, our coalition's companies have played a  
470 critical role in fostering innovation. We invest billions of  
471 dollars annually on research and development to create  
472 American jobs and improve lives. Caterpillar alone has more  
473 than 14,000 patents worldwide, either awarded, or in the  
474 approval process. Caterpillar is a company of innovation.  
475 We spend \$8 million a day on R and D.

476 Let me say at the outset that we believe bad faith  
477 demand letters are a problem, and we support crafting a  
478 balanced solution. Notification of patent rights are  
479 routinely presented in business to business communications to  
480 provide early notice of a patent that otherwise may not be

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481 known to the recipient. Patent demand communications can  
482 also start the clock running on patent damages. Recipients  
483 take these letters seriously in the design and development of  
484 new products and technology, oftentimes designing around the  
485 patent to avoid knowingly infringing another party's rights.

486 In many instances, the primary goal of the sender is  
487 simply to prevent copying, and ensure product differentiation  
488 within an industry. This is best accomplished by providing  
489 early notice, before monies are committed to substantial  
490 design and manufacturing investment, so that design-arounds  
491 are more readily accomplished. Thus, legitimate patent  
492 demand communications serve an important role in advancing  
493 technologies, providing consumers more choices, and ensuring  
494 the efficient self-policing of patent rights, preventing  
495 patent suits before they happen.

496 We believe that legislation on patent demand  
497 communications should address three areas of concern. One,  
498 sanctions should be limited to those who send objectively  
499 false and misleading patent demand letter to large numbers of  
500 end-users to extort settlements. Routine business to  
501 business communications should not be swept in.

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502           Two, clear rules of the road, with objective guidance as  
503 to what such communications should and should not contain,  
504 not a list of vague and subjective good faith and bad faith  
505 factors for a court to weigh in determining what constitutes  
506 a bad faith patent demand letter.

507           And finally, three, a safe harbor should be provided  
508 that clearly states what all patent owners remain free to do.  
509 By safe harbor, I mean a provision clearly informing all  
510 patent owners that they may, one, safely advise others of  
511 their ownership of, or right to license, or enforce a patent,  
512 two, to safely communicate to others that a patent is  
513 available for license or sale, three, to safely notify  
514 another, with reasonable specificity that they infringe a  
515 patent, or, four, to safely seek compensation for past or  
516 present infringement, or for a license to the patent. An  
517 appropriately crafted safe harbor will also help to insulate  
518 any legislation from challenge on Constitutional grounds as  
519 intruding on protected free speech.

520           Clearly, the sending of large numbers of objectively  
521 false, misleading, and deceptive demand letters needs to be  
522 stopped. The key here is objectivity. A laundry list with a

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523 large number of subjective good faith or bad faith factors to  
524 judge whether a demand letter crossed the line must be  
525 avoided. Such lists provide no meaningful guidance to the  
526 sender of a patent demand communication. Such subjective  
527 factors will spawn unnecessary litigation, and are not likely  
528 to pass Constitutional muster. Reasonable, clear, objective  
529 rules of the road are needed to guide normal business  
530 activities, rules that will not overreach and chill  
531 legitimate patent communications.

532 We have seen a variety of bills working their way  
533 through the states. We have seen legislation covering what I  
534 will term legitimate patent demand communications,  
535 legislation not limited to end-users, legislation without  
536 safe harbors, and legislation with vague worded factors that  
537 could sanction a perfectly legitimate patent demand  
538 communication. These differences in state legislation make  
539 it difficult, if not impossible, to provide clear guidance  
540 regarding what form of patent demand communications will be  
541 permissible nationally.

542 In conclusion, the public will benefit from the adoption  
543 of clear, balanced, and uniform guidance regarding the patent

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544 demand letters that constitute unfair or deceptive trade  
545 practices. This can be accomplished by the adoption of  
546 exclusive Federal legislation pre-empting state law directed  
547 to patent demand letters. Private enforcement under state  
548 Unfair or Deceptive Trade Practices laws should also be pre-  
549 empted, and limited to Attorney General enforcement.

550 Thank you, Mr. Chairman. I will be pleased to answer to  
551 any--

552 [The prepared statement of Mr. Skarvan follows:]

553 \*\*\*\*\* INSERT C \*\*\*\*\*

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|

554           Mr. {Terry.} Thank you, Mr. Skarvan.

555           Mr. Schultz, you are now recognized for your 5 minutes.

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|

556 ^STATEMENT OF JASON SCHULTZ

557 } Mr. {Schultz.} Thank you, Chairman Terry, and Ranking  
558 Member Schakowsky, and members of the subcommittee. And,  
559 again, apologies for my delay getting here.

560 At NYU Law I run a law and technology policy clinic, and  
561 for some people that is a bit of a confusion. They are like,  
562 what do you mean? What is a pro bono clinic doing in the law  
563 and technology area? Well, one of the things we do is we get  
564 a lot of e-mails and phone calls from some of these people  
565 who have received demand letters and can't afford to hire a  
566 patent attorney, and they want to know what to do.

567 And I can tell you from my experience, now over 10 years  
568 generally, but specifically 7 years running pro bono clinics  
569 such as these, that, when I look at the letter, if it is some  
570 vague letter that doesn't actually specify what the  
571 accusations of infringement are, sometimes what all the  
572 patents are, and the claims at issue, it is hard for me to  
573 tell. It is hard for me to tell them anything. It is hard  
574 for my students, who I am supervising, and trying to teach to

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575 be lawyers, to tell them anything. And that is why I think  
576 this issue is very important, and I am very glad the  
577 subcommittee is taking it up, because this is not just about  
578 the shakedown. This is not just about the end-user or the  
579 small business who receives a letter, but it is also about  
580 helping them, if they can find help, to have the attorneys be  
581 able to advise them.

582         It is one thing to defend a patent litigation, and we  
583 have seen a lot of statistics about how many millions of  
584 dollars that takes, but sometimes you can resolve these  
585 issues in good faith, if you have enough information. So I  
586 just want to highlight that this is about an intermediate  
587 step, as much as a final step, in sort of looking at this  
588 problem broadly.

589         Now, who are the people who receive demand letters? You  
590 have heard about a number of folks who are in very precarious  
591 situations when they receive these letters. My clinic and my  
592 students, we often will advise very small entrepreneurs, in  
593 terms of the size of their operation. These will be  
594 application developers who are just writing something for the  
595 iTunes or Google App store. They will be mom and pop

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596 websites who are trying to develop their own content. Some  
597 of these patents actually cover content, and the use of  
598 content, and how it interacts with technology. And some of  
599 them will be community projects. We have seen a lot of work  
600 right now developing civic technology to try and improve  
601 roads, to try and improve use of data, and look at the  
602 environment, improve water quality. They are all receiving  
603 patent demand letters too, many of them just as vague as the  
604 ones you have been hearing about.

605         So in this role, there are sort of two problems that I  
606 think this committee could address. One is, as we have  
607 heard, that there are these vaguenesses that in some ways can  
608 even be deceptive when they are being asserted as a  
609 guaranteed infringement. So the patent owner will send a  
610 letter, say, you infringed this patent, but won't explain  
611 why, when I don't think even the patent owner knows, because  
612 this will be part of a campaign of general assertion, not  
613 specific to any individual or entity, but just, we believe  
614 this whole group of people out there somehow infringed. And  
615 they assert it as if it is the truth, but they don't even  
616 know, and that, to me, is deceptive. And the second is, as

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617 we have heard, when they have no intention to sue whatsoever,  
618 that the threats made are intimidating, and put the  
619 recipients in a position where they don't actually know what  
620 their options are.

621         So when looking at this, I think we have just started to  
622 collect information about the problem, and I just want to say  
623 that efforts to try and collect more demand letters, such as  
624 trollingeffects.org, have been somewhat successful, but I  
625 would like to see more information so we can understand the  
626 scope of the problem.

627         But turning to the solution, I think that, for me, these  
628 letters should be required to have specific allegations and  
629 information in them so that the recipient can look at them  
630 and assess what is actually going on, what are they being  
631 accused of? Several of the small entrepreneurs, and coders,  
632 and developers that I have talked to, they are actually  
633 technical people. They could actually try and figure this  
634 out, but they look at the letter, and they say, I have no  
635 idea what they are talking about.

636         And part of that is not just because the patent is  
637 vague, but because there is no information about what that

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638 patent owner things that this small coder did, or what the  
639 application that they put up on the iTunes store does that  
640 they think infringes. And so that information would be  
641 extremely helpful, and to require that, to require the patent  
642 owner to do their homework, to look at what this recipient  
643 has done, would be extremely helpful for the people that my  
644 students and I help.

645 I think it would also help those who are recipients of  
646 good faith demand letters as well, because let us say you do  
647 actually infringe the patent. Well, you should then figure  
648 out, are you going to design around it? Are you going to pay  
649 the license? Are you going to fight the patent because you  
650 believe it is invalid, even though you might actually fall  
651 into the claims? Those are legitimate decisions, and, again,  
652 more information early on helps resolve this at the lower  
653 cost.

654 The other thing is that our public patent system is a  
655 public notice system. And I just want to reinforce that, as  
656 my final point, to say that it is as much about what the  
657 patent says when it is published at the Federal Register, but  
658 also when a patent owner is asserting it, they are asserting

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659 a public grant to them of a property right. And I think that  
660 the meets and bounds of that assertion, and when you trespass  
661 on it, should be as clear as anything else. Thank you.

662 [The prepared statement of Mr. Schultz follows:]

663 \*\*\*\*\* INSERT D \*\*\*\*\*

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|

664           Mr. {Terry.} Thank you.

665           Mr. Chandler, you are recognized for 5 minutes.

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|

666 ^STATEMENT OF MARK CHANDLER

667 } Mr. {Chandler.} Thank you, Chairman Terry, Ranking  
668 Member Schakowsky, members of the subcommittee. My name is  
669 Mark Chandler. I am General Counsel of Cisco Systems. I am  
670 here today to describe our experience with a new kind of  
671 scam. I am talking about a rip-off that is based on a  
672 formula that is as old as the hills, but dressed up as patent  
673 infringement and innovation protection. The scam artists, as  
674 you have heard, send out thousands of letters not to me, but  
675 to my small business customers, and they file lawsuits in the  
676 hope of a payday not based on the merits of the case, but in  
677 the fears of victims who just want a problem to go away.  
678 These victims, mom and pop stores, community banks,  
679 hospitals, car dealers, restaurants, aren't manufacturers of  
680 products. I do that. They are simply users, like you and me  
681 in our private lives.

682 As Cisco's chief legal officer, I want to defend my  
683 customers, but we need your help in bringing some light, some  
684 sunshine, to these nefarious practices. Cisco was founded 30

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685 years ago to build products so incompatible computer systems  
686 could talk to each other. Today we are the world's largest  
687 manufacturer of Internet equipment, from backbone switches,  
688 to phone and video systems. Our annual revenue is about \$50  
689 billion, and we directly or indirectly provide jobs to  
690 hundreds of thousands of Americans. Our products are used  
691 literally by billions of people around the globe, and are in  
692 tens of millions of American homes and businesses. We spend  
693 more than \$7 billion a year on research and development. We  
694 hold over 10,000 individual U.S. patents. We believe in a  
695 strong patent system.

696 Now let me tell you a story which, unfortunately, is not  
697 unique. The story is not about patents. It is about using  
698 patents as the cover for a scam. Our story begins when a  
699 lawyer named Noah Whitley bought patents related to Wi-Fi  
700 from a great American chip maker, Broadcom, and created an  
701 entity that I think the somewhat cynically named Innovatio.  
702 Broadcom, for its part, didn't want the patents anymore,  
703 since they were near expiration, had been broadly cross-  
704 licensed to other chip companies, and were subject to binding  
705 contracts requiring licensing on fair terms.

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706           But Whitley wasn't deterred by that. He and his lawyers  
707 sent 14,000 letters to small businesses, cafes, bakeries,  
708 inns and hotels, a children's health clinic, basically anyone  
709 that might use Wi-Fi in their place of business. Did he tell  
710 them what specific products they had might infringe, might  
711 have? Not even a list of types of products? No. Instead,  
712 his lawyers just wrote, I represent an individual who has  
713 suffered injuries as a result of your company's business, and  
714 claiming that the Innovatio portfolio covers all Wi-Fi usage.

715           Did his lawyers disclose that a huge proportion of Wi-Fi  
716 devices were already licensed, and therefore no more could  
717 legally be collected on those patents? No. Instead, he told  
718 them that almost a billion dollars had been collected in  
719 royalties on those patents, that thousands of companies had  
720 paid, without letting on that almost all those royalties were  
721 exclusively collected by Broadcom in cross-licenses that had  
722 little or nothing to do with these patents.

723           Did they tell them that the patents related to industry  
724 standards, and had to be licensed on fair terms? No.  
725 Instead, they told them, and again I quote, ``We wish to  
726 license your company at a very affordable rate, far less than

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727 the cost of patent litigation. I can quote you a rate of  
728 less than \$3,000 per location.'" This for patents that a  
729 court later determined were worth pennies per chip, and  
730 equipment that these businesses had spent, at most, a few  
731 hundred dollars to buy.

732 And did they tell them that manufacturers, like my  
733 company, were eager to defend them? No. Instead, they wrote  
734 that equipment manufacturers have not stepped in to defend  
735 any of their users. This means we can still sue your client,  
736 and they cannot expect equipment manufacturers to aid in  
737 their defense.

738 Finally, for those who had the temerity to resist, they  
739 enumerated thousands of pages of documents that they said  
740 needed to be reviewed, meaning a mountain of legal fees.  
741 Now, sadly, this isn't an isolated incident, as General  
742 Sorrell, Mr. Brouillard, and others in the panel can tell  
743 you, but a dangerous trend.

744 Let me close by suggesting four simple steps that would  
745 make it much harder to carry out these schemes. First,  
746 requiring anyone sending more than 10, or some other number  
747 of patent demand letters to someone who is not a manufacturer

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748 or re-seller of the product to file the letters in an online  
749 registry, so they are easy to find. Second, require them to  
750 include a list of model numbers which they believe infringe,  
751 the fact that the manufacturers may be required to defend,  
752 and contact information for the manufacturers. Third,  
753 require any such letter to include the names of the real  
754 entities or individuals who own the patents. And fourth,  
755 require the letters to include a list of all previous  
756 licenses, and whether the patents are subject to special  
757 licensing rules that apply to industry standards.

758         While the FTC can already investigate and sue the most  
759 egregious patent scam artists, these simple steps will  
760 provide a basic level of transparency to protect innocent  
761 end-users. Requiring full disclosure about what is being  
762 offered for sale doesn't violate anyone's free speech. I  
763 stepped into that case, and I spent \$13 million of my  
764 company's money to put a stop to this. The paycheck I get  
765 every other week says Cisco on the top of it, but every cent  
766 of it comes from my customers. That is why I am here today.  
767 That is why I am passionate about making sure they don't get  
768 ripped off by charlatans dressed up as innovators when they

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769 trust us to supply them with products.

770 And, Mr. Chairman, if the predators are forced to come  
771 to me, once they have disclosed what they are after, I can  
772 guarantee they will get a fair fight. Thank you.

773 [The prepared statement of Mr. Chandler follows:]

774 \*\*\*\*\* INSERT E \*\*\*\*\*

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|

775           Mr. {Terry.} Thank you.

776           Dr. Dixon, you are now recognized for your 5 minutes.

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|

777 ^STATEMENT OF MICHAEL DIXON

778 } Mr. {Dixon.} Thank you, Chairman Terry, Ranking Member  
779 Schakowsky, and members of the subcommittee. I appreciate  
780 the opportunity to come here today. My name is Michael  
781 Dixon. I am president and CEO of UNeMed Corporation. We are  
782 the technology transfer and commercialization entity for the  
783 University of Nebraska Medical Center, so my testimony today  
784 will focus on preventing illegitimate and deceptive patent  
785 demand letters without modifying the U.S. patent system, or  
786 restricting university technology transfer offices.

787 Universities are uniquely positioned here because we  
788 work with innovators at the university level, as well as  
789 downstream partners that are trying to commercialize our  
790 discoveries. I am going to have three main points today.  
791 One, universities have an enormous economic impact. Two,  
792 strong and forceful patents must be preserved. And three,  
793 ambiguous, vague patent demand letters are the lifeblood  
794 patent trolls, and using a tool like the FTC makes much more  
795 sense than modifying patent law for a second time in two

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796 years.

797 I would like to start by offering a bit of background on  
798 the scope of the University of Nebraska research and  
799 technology transfer. We are a proud member of the Big Ten,  
800 and have a very active research enterprise. Over the last 3  
801 years we have invested \$1.1 billion in research. 3/4 of that  
802 funding comes from Federal sources, such as NIH, NSF, and  
803 DOD. In that time, 625 new discoveries, new inventions, were  
804 created, and that led to more than 150 licenses to companies.  
805 So that is 150 companies that are going to invest more money  
806 to bring these discoveries to life, and make the world a  
807 better place.

808 Furthermore, 20 of those companies were created in  
809 Nebraska, creating economic development and jobs for  
810 Nebraskans in high growth, valuable companies. This  
811 licensing generated more than \$37 million in revenue for the  
812 University of Nebraska, and that mean more money for  
813 research, and more discoveries. Now, we are just one of many  
814 universities that undertake this. Last year, as a total,  
815 U.S. universities filed over 22,000 patents. They executed  
816 more than 5,000 licensing agreements, and generated \$2.6

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817 billion in revenue. According to the Association for  
818 University Technology Managers, they added \$385 billion to  
819 the U.S. GDP. This is a very big economic force.

820         The economic impact is primarily based on patents.  
821 Companies are only interested in investing the millions or  
822 billions of dollars to bring these technologies to market if  
823 there is strong patent protection available. Quick story  
824 from our med center, as I mention in the testimony, the  
825 LeVeen needle electrode was invented at UNMC, and our  
826 industrial partner, Boston Scientific, brought it to the  
827 market. However, as the product neared FDA clearance, they  
828 found that it was necessary to enforce the licensed product  
829 against competitor. The parties both followed the  
830 appropriate protocol, worked out their differences through a  
831 patent infringement suit.

832         At the end, there was a cross-license, some payments,  
833 and the products were successfully brought to the  
834 marketplace. The system worked appropriately. The take-home  
835 message here is that any action must preserve patent rights,  
836 and to continue to provide incentives for both large and  
837 small businesses that invest in technology that makes our

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838 lives better.

839           There is a common theme with patent demand letters, and  
840 that ambiguity. We have heard it already, bad actors are  
841 trying to scare, deceive, inappropriately extort money under  
842 the guise of patent enforcement, and they often use a shotgun  
843 approach, peppering the industry with hundreds of letters,  
844 often lacking in detail. As a technology transfer office,  
845 not only do we work with startup companies who have received  
846 these letters, but we have also been on the other side, and  
847 we have had to enforce our patent rights. When we make that  
848 important decision to send a demand letter, we find it is  
849 critical to provide detailed information for the recipient.  
850 In addition to a reasonable standard, it allows the recipient  
851 to make informed decisions.

852           In my written testimony, I offered seven items that we  
853 have in a demand letter. Items three through seven of this  
854 are often missing, as we have heard before, in demand  
855 letters. And I will say that, as a university, we are very  
856 conservative. We don't take litigation lightly. When we  
857 send a demand letter, we are going to go do our homework.  
858 And so, for us, it is very important that the recipient know

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859 what claims they are infringing, and that we identify  
860 specifically what product it is that is infringing those  
861 claims.

862 We want to make sure that the recipient knows who is  
863 suing them. Again, legitimate organizations don't hide  
864 behind shadow entities. If someone is infringing our patent,  
865 we want them to know who we are, and what our patent claims.  
866 Our goal is to settle the disagreement and provide as much  
867 information as is critical for that to occur. Some trolls  
868 use marketing entities that have no subject matter expertise,  
869 and cannot answer simple questions relayed in the demand  
870 letter. This, coupled with a shell entity, leads to a series  
871 of dead ends and frustration for small businesses with  
872 limited resources as expenses mount with no answers.

873 Another quick story from one of our partners. They  
874 received a demand letter from a patent troll last month.  
875 While the letter identified the patent being infringed, it  
876 did not give the owner of the patent, the role of the  
877 organization contacting the company, a knowledgeable point of  
878 contact, or adequate time to respond. In fact, the point of  
879 contact turned out to be a marketing firm that was just

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880 established to send these letters through a shell company.

881 The take-home message here is reduce the ambiguity associated  
882 with patent demand letters, and you will reduce the power of  
883 the patent trolls.

884 Thank you very much for your time. I look forward to  
885 any questions.

886 [The prepared statement of Mr. Dixon follows:]

887 \*\*\*\*\* INSERT F \*\*\*\*\*

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888           Mr. {Terry.} Thank you very much. And, I am sorry,  
889 Ranking Member Schakowsky has a meeting, so we are going to  
890 let her go out of order and ask the first set of questions.  
891 So, Ms. Schakowsky, you are now recognized for your 5  
892 minutes.

893           Ms. {Schakowsky.} I appreciate that, Mr. Chairman. Is  
894 there anyone on the panel who thinks that it would be  
895 inappropriate for Federal legislation, not getting into  
896 specifics, is there anybody who thinks that Federal  
897 legislation is unnecessary? Okay.

898           Attorney General Sorrell, you made a point of mentioning  
899 the issue of pre-emption in your testimony. I wondered if  
900 you could talk about that, though, on protecting whatever  
901 states do.

902           Mr. {Sorrell.} We are currently in litigation under our  
903 state Consumer Protection Act for unfair and deceptive acts  
904 and practices in commerce against this MPHJ Technology  
905 Investment LLC. And as soon as we filed that action under  
906 our so-called UDAP statute, MPHJ removed the case to Federal  
907 Court, and promptly said two things. One, that since this

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908 was in the patent arena that the lawsuit is not only  
909 frivolous, and filed for political purposes, but that we are  
910 totally pre-empted because patents are exclusively within the  
911 province of the Federal government, and, secondarily, that we  
912 lack personal jurisdiction over them for simply asserting  
913 patent infringement by sending these letters.

914 And that is why we are asking the Congress, if the  
915 Congress takes action here, to state clearly that AGs have  
916 legitimate--they are not pre-empted when there are unfair and  
917 deceptive acts and practices in the guise of an assertion of  
918 patent infringement, and that states are able to, without  
919 being pre-empted, enact statutes that prohibit bad faith  
920 assertions of patent infringement. So we are fighting that  
921 in Federal Court, U.S. District Court, in Vermont right now.  
922 And, given the fact that Nebraska, Minnesota, New York have  
923 already--

924 Ms. {Schakowsky.} You said Wisconsin?

925 Mr. {Sorrell.} Wisconsin hasn't yet, but Wisconsin has  
926 just enacted a statute on bad faith assertions of patent  
927 infringement, but the AGs of those other states have taken  
928 action, and in virtually each case been run up against this

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929 argument, you don't have any business here, you are  
930 pre-empted, because this is patent--

931 Ms. {Schakowsky.} 42 AGs you said, right?

932 Mr. {Sorrell.} 42 AGs signed a letter to Senate  
933 leadership about matters that are, actually just this week,  
934 moving forward in the Senate.

935 Ms. {Schakowsky.} Okay. Let me just go through a list  
936 of things we have heard from a number of you, things that  
937 should be in these letters, in the demand letters. If anyone  
938 thinks that they should not be in a demand letter, let me  
939 know. Raise your hand. Identification of the patent being  
940 infringed, identification of the owner of the patent, contact  
941 information for a person who can discuss resolution,  
942 identification of each claim of the patent being infringed,  
943 identification of the infringing device, method, or service.  
944 Okay, which one was that? Identification of each claim?

945 Mr. {Skarvan.} Yes, identification--

946 Ms. {Schakowsky.} Okay.

947 Mr. {Skarvan.} --of each claim. I think it was  
948 referred to earlier that, certainly, on behalf of the 21C, a  
949 number of the members have extremely large equipment not

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950 readily accessible. Information is not readily accessible  
951 regarding that piece of equipment. We usually rely on trade  
952 shows, and perhaps advertising, regarding certain features,  
953 or possible benefits that seem to look like something we have  
954 a patent on. So when I am asked to provide analysis, or  
955 identify a claim against a product, I simply can't comply  
956 with that level of detail. I am not in possession of that  
957 information.

958 Ms. {Schakowsky.} Okay. It is on the record. Thank  
959 you. Identification of the infringing device, method, or  
960 service, a description of how the device, method, or service  
961 infringes, identification of entities, other than the patent  
962 owner, who may benefit from enforcement, identification of  
963 all entities that had been granted--go ahead.

964 Mr. {Skarvan.} I think you just have to be clear, when  
965 you talk about benefit from enforcement, that, I think, in  
966 this additional detail is forthcoming, because there have  
967 been a number of proposals talking about how to identify  
968 that. Ultimately you are looking for somebody that, you  
969 know, in a lawsuit, their damages, if there is a fee paid,  
970 they would take and participate in that reward.

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971           Ms. {Schakowsky.} Identification of the parent company  
972 of the patent.

973           Mr. {Skarvan.} I will say, the devil is in the details.  
974 On the face, that looks simple. I have heard other companies  
975 state, for example, Intellectual Property Owners'  
976 Organization, that that in itself can be difficult to  
977 ascertain and provide correctly.

978           Ms. {Schakowsky.} Okay. Identification of all entities  
979 that have been granted a license to the patent.

980           Mr. {Skarvan.} Again, I think you start to get into a  
981 little bit of a burdensome situation with a company with tens  
982 of thousands of patents to understand exactly the entire  
983 licensing spectrum regarding that patent.

984           Ms. {Schakowsky.} Okay.

985           Mr. {Dixon.} Also, on that one, I will say, from the  
986 university standpoint--

987           Ms. {Schakowsky.} Okay.

988           Mr. {Dixon.} --if you are looking at non-exclusive  
989 licensing, sometimes those lists get very long, and sometimes  
990 a company's trade practices, they request some confidentially  
991 that they, in license, that technology for competitive

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992 advantages. So that may become a little difficult.

993 Ms. {Schakowsky.} Okay. This is helpful. Notice to  
994 the recipient that they may have the right to have the  
995 manufacturer defend the case.

996 Mr. {Skarvan.} I am sorry, could you repeat that?

997 Ms. {Schakowsky.} Notice to the recipient that they may  
998 have the right to have the manufacturer defend the case.  
999 And, last, some factual basis for the licensing fee, or  
1000 settlement amount demanded, if any.

1001 Mr. {Skarvan.} Well, again, I come back to, I think,  
1002 the very basic elements. These all require additional, I  
1003 think, discussion and explanation, because these concepts can  
1004 be very complex. I think when you come to the very basic  
1005 elements that should be the content of a patent communication  
1006 representing a demand on something, the identity a person or  
1007 entity with a right to enforce the patent or patents forming  
1008 the base of the demand, and identification with at least one  
1009 product, service, or technology. Those, I think, are the key  
1010 elements. When you add to those elements, I think you are  
1011 getting into some very definitional and perhaps burdensome,  
1012 complex disclosures that, really, at the point in time, are

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1013   benefitting the assertion.

1014           Ms. {Schakowsky.} Okay. My time is expired. I  
1015   appreciate that. So, you know, we can inquire among all of  
1016   you in writing responses to these suggestions, or just  
1017   proposals. Yeah. Thank you. I hear you on the burdensome  
1018   issue.

1019           Mr. {Terry.} All right. Well, first of all, I think  
1020   the nature of Ms. Schakowsky's questions were pretty similar  
1021   to what I was going to ask, but it shows that if we are going  
1022   to do, and I would say it is likely that we would draft  
1023   something sometime in the near future. What we are trying to  
1024   figure out is what, if we draft a bill, needs to be in there,  
1025   and it appears to us that we need to itemize, or be  
1026   prescriptive, in what has to be in a demand letter. So that  
1027   is why Ms. Schakowsky did a list of things that have been  
1028   discussed that should be in there.

1029           Let me ask you just more generally, starting with you,  
1030   Mr. Sorrell, or AG Sorrell, what are the characteristics that  
1031   should be in a valid patent demand letter?

1032           Mr. {Sorrell.} It shouldn't be any question of who is  
1033   asserting the infringement. There should be evidence of

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1034 investigation, or in depth analysis of this particular  
1035 recipient's use of the technology that is allegedly violative  
1036 of the patent. It should be clear if there are others with  
1037 an interest in this assertion of patent infringement, and who  
1038 they are. There should be legitimate addresses, contact  
1039 information, for those asserting the infringement. If this  
1040 patent has been the subject of a final decision,  
1041 administrative decision, or a judicial case against the  
1042 patent that is being asserted, that information should be  
1043 reflected, at least for starters, and the demand should give  
1044 a reasonable amount of time for the person to respond. And  
1045 there shouldn't be this undue burden thrown to the recipient  
1046 of a letter to prove your innocence, if you will.

1047 Mr. {Terry.} Right. As quickly as possible, Mr.  
1048 Brouillard--

1049 Mr. {Brouillard.} Yes, sir.

1050 Mr. {Terry.} --what points should be in a demand  
1051 letter?

1052 Mr. {Brouillard.} I would agree. I think it is obvious  
1053 you can't receive a letter that simply says, A, we did an  
1054 investigation, and found that you used our technology, and

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1055 here is a list of numbers. It needs to be clearly identified  
1056 as to what is being asserted, what investigation was  
1057 conducted, how do you know that we are violating your  
1058 patents? And, obviously, for someone like myself, who is  
1059 totally ignorant of this issue until this all came up about a  
1060 year and a half ago, there has to be something more than  
1061 simply a list of numbers. To me, I don't even know if those  
1062 numbers were legitimate patent numbers.

1063 Mr. {Terry.} Okay. More--

1064 Mr. {Brouillard.} More specificity in the claims that  
1065 are being made.

1066 Mr. {Terry.} Mr. Skarvan, I am going to ask you the  
1067 same question, but ask a little bit more clarity, because it  
1068 does seem like you can identify what is being infringed. If  
1069 you saw something at a trade show or an advertisement, you at  
1070 least have a pretty good hunch that there may be an  
1071 infringement. So it--

1072 Mr. {Skarvan.} I can suspect, because I obviously can't  
1073 see inside, and I am stuck with advertising. I do want to  
1074 bring up a point that, you know, we discussed a few things,  
1075 and I want to differentiate a bit, if you don't mind, the

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1076 difference between business to business communications, and  
1077 the egregious actions I have heard here were end-users that  
1078 are being targeted. And I will just say, in business to  
1079 business communications, and patent demand letters, I think,  
1080 generally under the law, the way it plays out, less is more,  
1081 and let me explain that.

1082         The number one concern prior to all this legislation  
1083 that I had when I sent out a patent demand letter, or any  
1084 member of the 21C sends out a patent demand letter, is does  
1085 that contain enough information that the recipient feels  
1086 immediately threatened, and they now have potential  
1087 jurisdiction, they call it declaratory judgment jurisdiction,  
1088 to say, look, this entity has threatened me. I cannot  
1089 continue on with my investment without some certainty here on  
1090 this issue. They brought the threat, I want it determined  
1091 now. And all of a sudden you are in a patent lawsuit under  
1092 what they call a DJ action.

1093         And so when we send out letters, they tend to be a first  
1094 in a series of letters. And when people point to a specific  
1095 patent demand letter, all I can think of is, I have a series  
1096 of letters to go out, none of them are the same. And they

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1097 generally have these three things, but they don't have to,  
1098 because I have different target audiences I am sending this  
1099 letter to. So I just want to make sure that this kind of  
1100 correspondence, which I think less is more, keeping it out of  
1101 the courts, doesn't include a lot of these details.

1102 And so, in answer to your question, I don't always have  
1103 access to the information. I don't have that detail, and nor  
1104 may I want to even put that level of detail or threat in my  
1105 letter if it ends up inviting a DJ action, and brings a  
1106 patent suit in court.

1107 Mr. {Terry.} All right. The other three witnesses  
1108 probably will have to submit that answer in writing, and I  
1109 apologize that my time has run out.

1110 So, at this point, Mr. Welch, you are recognized for 2-  
1111 1/2 minutes. No, Mr. McNerney, you are recognized for 5  
1112 minutes.

1113 Mr. {McNerney.} Thank you for the full 5 minutes, Mr.  
1114 Chairman. I think it was really good testimony. I thank you  
1115 all for coming this morning. One of the things that I think  
1116 was a matter of disagreement among the witnesses is how to  
1117 enforce this. I mean, there is a pretty good agreement that

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1118 the letters should have a degree of specificity, but, as  
1119 Congress, can we write a law that is flexible enough that it  
1120 will be effective, that the patent trolls won't be able to  
1121 get around, and so on, or should invest the FTC with the  
1122 authority to do that in a way that would be effective?

1123 Mr. Dixon, I think you had mentioned that you thought  
1124 the FTC. How would we empower them, or do you believe they  
1125 already have enough authority in the existing statute?

1126 Mr. {Dixon.} I believe the FTC does have some authority  
1127 here, and it would be wise of Congress to remind them that  
1128 they do have some authority on some unfair trade practices.  
1129 I think giving a little more teeth to the FTC, and allowing  
1130 them to look at these broad, vague patent demand letters,  
1131 while still, I agree, allowing business to business  
1132 communications to still occur, and for business to transact  
1133 that way, and not having that fall under this FTC action, is  
1134 very important. But I think giving them a little more  
1135 authority would allow business to still go on, and for these  
1136 legitimate actions to still take place, while not affecting  
1137 general patent law itself, which is the lifeblood of many of  
1138 our businesses.

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1139           Mr. {McNerney.}   Okay.   Mr. Chandler, would you like to  
1140   comment on that?

1141           Mr. {Chandler.}   Yeah.   I would make one distinction.  
1142   Mr. Skarvan referred to business-to-business, and I think  
1143   what we are referring to here is letters addressed to end-  
1144   users.   The end-users may, in fact, be small businesses, and  
1145   I am not sure that some of the issues that Mr. Skarvan had  
1146   with some of Ranking Member Schakowsky's enumerated proposals  
1147   would apply in the case of an end-user communication, as  
1148   opposed to when you are dealing with a competitor who is also  
1149   a manufacturer, and where you have this dance that goes on in  
1150   dealing with potential infringement allegations.

1151           In looking at the end-user situation, I think the space  
1152   where Federal legislation would be very helpful would be to  
1153   establish clearly that it is an unfair business practice, in  
1154   those types of communications to end-users, to not include  
1155   certain types of information.

1156           The FTC today can go after egregious misbehavers who are  
1157   misleading and deceptive, but once you set a very clear set  
1158   of standards, and also require transparency on those letters,  
1159   manufacturers like me can step in.   It almost becomes self-

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1160 enforcing once you put some sunshine on these activities.

1161 And that is why there is a great opportunity to get something

1162 done here without creating a regulatory structure around it.

1163 What is really needed is daylight.

1164 Mr. {McNerney.} So you feel that Cisco can do a good

1165 job in defending your customers, if you have the right tools

1166 to do that?

1167 Mr. {Chandler.} If we know this is going on, we can

1168 step in and do it. And if it is visible what is going on,

1169 these people will be forced to stop because the group of

1170 people who are being attacked can also band together and take

1171 action, as Mr. Brouillard has pointed out. But sometimes it

1172 takes some daylight before you know that this is actually

1173 happening. So transparency is really almost a solution in

1174 itself here.

1175 Mr. {McNerney.} Thank you. Mr. Skarvan, one of the

1176 things you recommended was that sanctions be imposed on bad

1177 actors. Wouldn't it be just easy for them, a bad actor, to

1178 put up another banner and continue on? Even though the

1179 first, you know, label is sanctioned, they can go to another

1180 label and carry on their activities?

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1181           Mr. {Skarvan.} Well, I think what you stated is  
1182 correct. It is very, very difficult to, you know, capture  
1183 some of these actors, and I think it is very difficult in  
1184 capturing them with a single demand letter that does or does  
1185 not meet, if you want to say, the requirements set forth in  
1186 legislation. What I think works more effectively is to  
1187 capture their behavior. And the behavior we are seeing, I  
1188 think it has been said today, is that, you know, these  
1189 hundreds and thousands of letters that go to end-users.

1190           And that is where you have got to really focus in on,  
1191 and begin asking questions, because now you have got the  
1192 behavior, and the business model I think people here are  
1193 objecting to, these hundreds and thousands, I think it was  
1194 16,000--

1195           Mr. {McNerney.} Yeah.

1196           Mr. {Skarvan.} --letters nationwide. And that is where  
1197 I think the FTC, uniform laws, and, you know, certainly  
1198 uniform, you know, enforcement by the Attorney General, they  
1199 act as a clearing house to identify this rampant behavior.  
1200 And once you can see that behavior, now I think it is pretty  
1201 easy to begin the inquiry into the entities engaging in that

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1202 behavior.

1203 Mr. {McNerney.} Thank you. Thank you, Mr. Chairman.

1204 Mr. {Terry.} Thank you. Now recognize Vice Chairman of  
1205 the Committee, Mr. Leonard Lance. You are recognized for 5  
1206 minutes.

1207 Mr. {Lance.} Thank you, Mr. Chairman. As I understand  
1208 it, there are five or so existing state laws on this issue,  
1209 and several other bills are awaiting signature by a governor,  
1210 and there are as many as 19 bills pending in state  
1211 legislatures. Given this situation, I would be interested in  
1212 the panel's view as to whether Federal legislation is needed.  
1213 Attorney General?

1214 Mr. {Sorrell.} Yes, Federal legislation is needed, and  
1215 hopefully included in that legislation would be an express  
1216 statement that the states are allowed to enact their own  
1217 statutes against bad faith assertions of patent infringement,  
1218 and/or to enforce their standard Consumer Protection Acts.

1219 Mr. {Lance.} Thank you. Others on the panel?

1220 Mr. {Brouillard.} Yeah, I agree. I think that U.S.  
1221 patent law is Federal legislation, and I think that anything  
1222 that can be done to strengthen that legislation should be.

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1223 In addition, you know, I think to get back at the Congressman  
1224 from California's comment, it is going to take a concerted  
1225 effort on both the Federal and state level, in some cases, to  
1226 do that. And the last point I would make is that if you had  
1227 Federal legislation, then it is more uniform across all  
1228 states, rather than a hodgepodge for companies that operate  
1229 in multi-states to try to deal with.

1230 Mr. {Lance.} Thank you. Others on the panel?

1231 Mr. {Skarvan.} And I agree, and I am glad you brought  
1232 that up, because not only is Federal legislation needed, but  
1233 we need uniform legislation that provides the same, if you  
1234 want to say, rules of the road across the states. States  
1235 certainly can enforce through the AG, but as far as having  
1236 different state statutes to provide different rules of the  
1237 road, different, if you want to say, private causes of  
1238 action, some have safe harbor, some have no safe harbor. I  
1239 mean, looking for a little bit more uniformity.

1240 Mr. {Lance.} Thank you.

1241 Mr. {Schultz.} I would like to just add two things.  
1242 One is that the patent system is an incentive system, and the  
1243 Congress is in a great position to sort of balance those

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1244 incentives. So if you want patent owners to do more to make  
1245 sure that certain recipients get the information they need,  
1246 you are giving them a patent, and you can require them to do  
1247 things. I think that is a nice balance there that doesn't  
1248 preclude states, but it kind of gives you that power.

1249         The other thing is this bottom-feeder model, this model  
1250 where they just send out thousands of letters, is premised on  
1251 the idea that they don't have to be specific to the  
1252 individual recipient, and I think that really needs to be in  
1253 there someone, that core specificity, else they will just re-  
1254 draft the letter in some other way.

1255         Mr. {Lance.} Thank you. Others on the panel?

1256         Mr. Skarvan, you referenced safe harbor language in your  
1257 comments, and in your testimony you suggest that safe harbor  
1258 language be included. Do you have a specific idea what type  
1259 of model you would like regarding safe harbor? Is there a  
1260 provision in one of the state statutes that we might examine,  
1261 and, if not, what would be an appropriate safe harbor  
1262 provision, from your perspective?

1263         Mr. {Skarvan.} I think the most recent state that  
1264 enacted a safe harbor, and worked through some of the

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1265 language difference, was Illinois--

1266 Mr. {Lance.} Illinois, yes.

1267 Mr. {Skarvan.} --statute, and when you look at the safe  
1268 harbor, I think it is helpful to look at it in combination  
1269 with the cause of action being limited to those letters sent  
1270 to the end-users, and--

1271 Mr. {Lance.} Um-hum.

1272 Mr. {Skarvan.} --have a good definition for end-users,  
1273 including businesses, not for resale, in that statute. And  
1274 they also have, not the subjective fact, but very clear false  
1275 behaviors, along with very clear requirements of the patent  
1276 owner, the patent number, and the general product or service  
1277 it covers.

1278 Mr. {Lance.} So, from your perspective, we might  
1279 examine the Illinois provision as a model for a Federal  
1280 provision?

1281 Mr. {Skarvan.} Yes. We have suggested that to other  
1282 states.

1283 Mr. {Lance.} Thank you. Others on the panel on whether  
1284 there should be a safe harbor provision, and if so, what it  
1285 should look like? No? Thank you, Mr. Chairman. I yield

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1286 back the 37 seconds.

1287 Mr. {Terry.} Thank you. At this time recognize  
1288 gentleman from Vermont to ask questions to another gentleman  
1289 from Vermont--

1290 Mr. {Welch.} Well, and others as well.

1291 Mr. {Terry.} --Mr. Welch.

1292 Mr. {Welch.} Thank you. I actually wanted to start  
1293 with Professor Schultz. What options does a small business  
1294 or startup company currently have when they receive one of  
1295 these vague threatening demand letters?

1296 Mr. {Schultz.} So I think that, if they are taking a  
1297 rational approach, they want to think about this as, you  
1298 know, first, as we doing what they say? Are we infringing  
1299 some patent? And then they have a couple of options. One is  
1300 they can challenge that assertion, right, in that they can  
1301 get an attorney, if they could afford one, or get pro bono  
1302 counsel.

1303 The second is they can decide to change what they are  
1304 doing, or design around that, and that is where the  
1305 specificity really helps them. If they realize that it is  
1306 only one small piece of whatever they are designing or doing,

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1307 they can maybe change that, and then maybe settle a little  
1308 bit, but move forward.

1309 And then the third is they can simply just pay to get  
1310 out of the way, which what so many of these are doing. So I  
1311 think we want to give them valid choices, and the only way to  
1312 do that is to have the specific information.

1313 Mr. {Welch.} And then what is a remedy if there is an  
1314 absence of specificity?

1315 Mr. {Schultz.} You mean in terms of what?

1316 Mr. {Welch.} For the receiver of that letter.

1317 Mr. {Schultz.} I mean, they are really stuck in a kind  
1318 of quandary, because they don't know what to do. They can't  
1319 explore those other choices. They don't know how to change  
1320 what they are doing. They don't know whether to challenge  
1321 it, because the allegations aren't there, so the only  
1322 rational choice left is to pay off the sender.

1323 Mr. {Welch.} Okay. I want to go back to Mr. Sorrell,  
1324 and have you think about this question too, because I might  
1325 want to get your point of view. But you have been really  
1326 advocating that this is a consumer protection issue, and that  
1327 there has to be some role for the states, and it would be a

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1328 mistake for the Federal government to pre-empt. Just  
1329 elaborate on that a little bit.

1330 Mr. {Sorrell.} These efforts are so widespread that  
1331 there is plenty of work for both Federal regulators and state  
1332 regulators. If you look at it from the drug trafficking  
1333 analogy, the Federal authorities typically take, you know,  
1334 the cartels and the large dealers, and they leave the street  
1335 dealers to the states. If we are looking at assertions of  
1336 pattern infringement, I believe the FTC does have authority,  
1337 but it can't police this spectrum entirely, and there is a  
1338 role for the states.

1339 Mr. {Welch.} Professor Schultz, do you think that makes  
1340 sense, in terms of a practical way to protect innocent  
1341 victims, like the Lincoln Street example? You know, a small  
1342 nonprofit, and those options you laid out, I think for them,  
1343 mainly, they are just terrified, and they can't make that  
1344 phone call to the lawyer because they know the meter is  
1345 running once that happens. And they hope it goes away, and  
1346 it doesn't.

1347 So it seems to me that what General Sorrell is  
1348 suggesting, that there be a consumer protection element, a

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1349 local ability of local consumer protection division, and an  
1350 Attorney General's office closer to the scene to be able to  
1351 protect, I should say, the rights of some of these small  
1352 businesses.

1353 Mr. {Schultz.} Absolutely. I think that is an  
1354 essential component. But I do think that, since the patent  
1355 law is Federal, it is also worth looking at the incentive  
1356 systems, and allowing the option that you could provide  
1357 consequences in the Federal system too. Because--

1358 Mr. {Welch.} Right.

1359 Mr. {Schultz.} --some of these things do go to court,  
1360 and when they go to court, there are consequences to whether  
1361 the letter was sent, and what it said.

1362 Mr. {Welch.} So if we provided consequences at the  
1363 Federal level, I mean, I like what you are saying about the  
1364 incentives, that makes a lot of sense to me, would we want  
1365 the benefit of local enforcement of those standards that we  
1366 have established here at the Federal level?

1367 Mr. {Schultz.} Absolutely. I think both can coexist,  
1368 and, in fact, contribute to the same goal.

1369 Mr. {Welch.} Okay. By the way, do patent holders, I

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1370 will stay with you, Professor Schultz, other than the trolls,  
1371 routinely target end-users, and could there be any legitimate  
1372 reasons to send demand letters to end-users?

1373 Mr. {Schultz.} So I will say generally no, except that  
1374 this term end-user, I think we have to be careful, because  
1375 these are very clever lawyers, right, who run these  
1376 companies, these trolls. And so if you define something too  
1377 specifically, in terms of one protected group, you know, they  
1378 will try and find a way around it.

1379 So I just want to be careful, because, again, a lot of  
1380 the folks who call my clinic, and are looking for pro bono  
1381 assistance, are people who develop apps. And they are, like,  
1382 two or three small, you know, it is a small business, two,  
1383 three people, just trying to create something to put on the  
1384 iTunes or Google store, or whatever. They are not end-users  
1385 in a sense, except they are the end-users of the Internet.

1386 Mr. {Welch.} Um-hum.

1387 Mr. {Schultz.} Right. So I just want make sure that if  
1388 we are going to cover people who are using standard  
1389 technology, it is not just only the physical stores, but it  
1390 is also anyone who kind of is using a product or service from

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1391 someone else.

1392 Mr. {Welch.} So I will ask the whole panel, is there--I  
1393 have only got 18 seconds.

1394 Mr. {Terry.} Yeah.

1395 Mr. {Welch.} Well, I guess I won't. Well, the question  
1396 I was going to ask, but then I will yield before there is an  
1397 answer, is what evidence do we have about the effect of  
1398 patent trolls on suppressing innovation?

1399 Mr. {Terry.} All right. That would be a great answer  
1400 for a written question--

1401 Mr. {Welch.} All right.

1402 Mr. {Terry.} --that we will submit. At this time--

1403 Mr. {Welch.} I yield back.

1404 Mr. {Terry.} Thank you. Gentleman yields back.

1405 Recognize the gentleman from Texas, Mr. Olson, for 5 minutes.

1406 Mr. {Olson.} I thank the Chair. And, first of all, I  
1407 don't like the term patent trolls. These aren't patent  
1408 trolls. They are patent bullies, like the bully on the  
1409 playground in 3<sup>rd</sup> grade, the bully every Monday who comes to  
1410 school, threatens to beat you up if you don't give him his  
1411 lunch. I mean, these are patent bullies.

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1412           And, thinking out of the box on how we stop this  
1413 behavior, in my home State of Texas, again, not directly  
1414 applicable, but they did something in 2011 called basically  
1415 loser pay. My state Senator, Joan Huffamn, got that thing  
1416 passed. It has been going on for about 3 years now, and what  
1417 they have done, not so much, again, in patent protection, but  
1418 just sort of legal protections for some of these frivolous  
1419 lawsuits, they basically empowered the Judge, the trial  
1420 Judge, to say, this is garbage, throw it out. He gets the  
1421 initial filing, say, frivolous, done.

1422           If that doesn't work, okay, how about I send it up to--  
1423 they are going for the home run. We know it is really bad,  
1424 but we want to take that shot, maybe knock that thing out of  
1425 the park. And if that is the case, I can send it straight  
1426 from my court to the Appellate Court, get this taken care of  
1427 quickly, so, again, the aggrieved party is not paying legal  
1428 bills on, and on, and on. Also, for the small guys, it was  
1429 less than \$100,000, you know, expedited civil action  
1430 procedure.

1431           And so, to ask all the panelists, is that something we  
1432 should look at? I mean, I know there are lots of pros and

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1433 cons, more Federal involvement, pre-emption, that type of  
1434 stuff, but, again, how can we take this ham away from these  
1435 patent bullies, not patent trolls?

1436 Mr. {Brouillard.} If you don't mind, I will take the  
1437 first shot at it. I certainly believe that part of the  
1438 legislation should include some opportunity for the party  
1439 that has been aggrieved in this situation to have their costs  
1440 reimbursed. I suspect if I got a letter from Caterpillar, I  
1441 would pay attention. But when I get a letter from an entity  
1442 I don't know that just lists a whole bunch of numbers, you  
1443 know, clearly, for someone like us, or any small business, to  
1444 defend, you know, we have been told it is a million dollar  
1445 cost to defend a patent lawsuit. We are certainly not in a  
1446 position to do that, and I really do believe that if a patent  
1447 troll, or if a patent bully, ran the risk of having to  
1448 reimburse someone, they would think twice about doing it in  
1449 the first place.

1450 Mr. {Olson.} General Sorrel, any comments, sir? And my  
1451 parents are voters in Vermont.

1452 Mr. {Sorrell.} In the Vermont statute, it allows for  
1453 awarding attorney's fees. But, again, to recover, you have

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1454 to establish that there was a bad faith assertion of patent  
1455 infringement. And I think some of the concern about AGs  
1456 getting involved in this arena is, are we going to sort of  
1457 muddy the waters?

1458 Speaking for myself, and pretty comfortably for the rest  
1459 of the AGs, we do not want to try to get in the middle of a  
1460 fair fight between two companies, where it is a reasonable  
1461 fight as to whether this patent exists, and what it controls.  
1462 We are really trying to deal with the bottom-feeders, and we  
1463 think that the current Federal standard of the awarding of  
1464 fees in patent cases ought to be eased so that they are  
1465 awarded more frequently. I am not prepared to say that loser  
1466 pays in every case. That might be an overreach there.

1467 Mr. {Olson.} Mr. Skarvan?

1468 Mr. {Skarvan.} Well, I would just say that some of  
1469 these concepts, you know, I think they can work,  
1470 conceptually. Generally they fall down if you try to apply  
1471 them just to one side of the coin, so they have to be  
1472 available, similar to bonding, to both parties, because they  
1473 are pre-determining that somebody actually is the bully ahead  
1474 of time. It all comes down to what actually is going on.

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1475 Certainly wouldn't want to be one-sided and attach that type  
1476 of penalty to a legitimate patent communication.

1477 Mr. {Olson.} Yeah, suddenly the bullied becomes the  
1478 bully, maybe, in that situation.

1479 Professor Schultz, any comment, sir?

1480 Mr. {Schultz.} Yeah. So I do think that, I mean, many  
1481 of the efforts that are being supported in Congress right  
1482 now, I think, are comprehensively looking at the problem, and  
1483 I think that linking them together, and making sure they all  
1484 fit well together, is good. So I think that, for instance,  
1485 the type of demand letter, or the kind of information that is  
1486 or is not shared, and how vague, and how deceptive it is may  
1487 well be appropriate factors to pay into a fee award, right,  
1488 or to say an adjustment of whether damages are available for  
1489 willful infringement or not. These kind of things, I think,  
1490 are linked, and are important. But I do think that the whole  
1491 problem needs to be dealt with on a couple different levels.

1492 Mr. {Olson.} Okay. Mr. Chandler, I have got time, sir.  
1493 You have got one more swing to take it out of the park?

1494 Mr. {Chandler.} You know, the Innovation Act that  
1495 passed the House with overwhelming bipartisan support

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1496 includes a provision for some cost-bearing when a case is  
1497 completely unreasonable. In this particular type of problem  
1498 that we are talking about today, though, it is unclear how  
1499 that plays out, because these things don't generally go to  
1500 litigation, because they get settled, because you have  
1501 someone who is using Wi-Fi in their business, and is told you  
1502 can spend hundreds of thousands, or millions of dollars to  
1503 defend this, or you can just pay us \$2,000. So I think--

1504 Mr. {Olson.} Yeah, the bully.

1505 Mr. {Chandler.} --the promise of that might be a looser  
1506 rate. I don't call them trolls because I don't like to  
1507 demonize my adversaries. I would just say they are like rats  
1508 running through a maze, and we need to take the food away at  
1509 the end, and then they will stop going through the maze. And  
1510 that is a systemic issue that we can address that won't  
1511 result in a lot of litigation and awards at the end.

1512 Mr. {Olson.} Thank you. My time restrictions are very  
1513 brief, sir.

1514 Mr. {Terry.} Thank you--

1515 Mr. {Olson.} Mr. Chair--

1516 Mr. {Terry.} --Mr. Olson. Now recognize the gentleman

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1517 from Illinois, Mr. Rush, for--

1518           Mr. {Rush.} Well, thank you, Mr. Chairman, and it has  
1519 been quite interesting. I want to thank the witnesses for  
1520 appearing before this subcommittee. Earlier, when  
1521 Congressman McNerney asked about the FTC's authority, and Dr.  
1522 Dixon mentioned that the FTC already has authority, and could  
1523 be encouraged to use that authority. Perhaps, Mr. Chairman,  
1524 we should encourage the FTC to be more aggressive on the  
1525 issue of patent trolls, be they bullies, or rats, or however  
1526 you want to define them.

1527           However, I am interested in understanding what  
1528 additional authorities the FTC could use in this space. For  
1529 example, General Sorrell, the FTC does not have authority  
1530 currently to collect civil penalties under Section V for  
1531 unfair and deceptive practices. General Sorrell, shouldn't  
1532 the FTC be able to bring cases for more than just injunction  
1533 relief, and also hitting these bad actors, be they rats or  
1534 trolls, directly in the pocketbook? And also, are there  
1535 other authorities that would be helpful, such as ACA  
1536 rulemaking, on declaring certain actions to be, ``per se,  
1537 deceptions''? For example, if a demand letter does not

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1538 include the patent number, or numbers, couldn't they just be,  
1539 based on that, declared, per se, deceptions? Or--

1540 Mr. {Sorrell.} Thank you. In my view, the Federal  
1541 Trade Commission does have authority in this arena right now,  
1542 and that is in part evidenced by the fact that MPHJ  
1543 Technology, that when the Federal Trade Commission started  
1544 investigating MPHJ Technology, it turned right around and it  
1545 sued the Federal Trade Commission to halt the investigation.  
1546 That being said, I would suggest that there be a  
1547 communication to the Federal Trade Commission about the other  
1548 issues that you raised, whether they think that the Congress  
1549 might underscore or enhance the authority that they currently  
1550 have.

1551 My concern is that, if legislation just speaks to  
1552 enhanced authority for the Federal Trade Commission, and you  
1553 don't speak to the states' authority to enforce our statutes,  
1554 it will be argued that you were consciously trying to cut the  
1555 states out of the equation.

1556 Mr. {Rush.} And are there any other witnesses who want  
1557 to comment on increasing the authority of the FTC? Mr.  
1558 Chairman, thank you, I yield back.

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1559           Mr. {Terry.} Thank you, Mr. Rush, and I appreciate your  
1560 input. Now recognize the gentleman from Ohio, Mr. Johnson.

1561           Mr. {Johnson.} Thank you, Mr. Chairman, and I  
1562 appreciate the panel being with us today.

1563           For all of you, and you can answer in whatever order you  
1564 would like, what role should the Federal Trade Commission  
1565 have regarding patent demand letters? Anybody want to  
1566 comment?

1567           Mr. {Sorrell.} I think I just answered that question,  
1568 so I pass it down the line.

1569           Mr. {Schultz.} I will just add one thing, which is that  
1570 I do think this question of understanding the problem, I  
1571 think we have a pretty good handle on it, but I think, for  
1572 instance, one of the questions is, what are the subpoena  
1573 powers of the FTC, in terms of getting access to the letters  
1574 that a particular entity might have sent out that they are  
1575 not aware of, things like that. And I do think that, if we  
1576 are going to support the FTC investigating, or state AGs as  
1577 well, that they do need to understand the problem, and they  
1578 do need to see the letters that have gone out, and the  
1579 practices of the entities. So I think that information

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1580 collection is an important aspect.

1581 Mr. {Johnson.} Okay. Mr. Chandler?

1582 Mr. {Skarvan.} Can I speak to the--

1583 Mr. {Johnson.} I am sorry, go ahead, Mr. Skarvan, yeah.

1584 Mr. {Skarvan.} Thank you. I speak to just the

1585 consistency and uniformity, and ensuring that consistency and

1586 uniformity, and providing that clearinghouse function to

1587 identify the bad behaviors, and giving comfort to the company

1588 that sends a handful of demand letters that they won't be

1589 brought into a private cause of action at the state level by

1590 perhaps a recipient who wants to play mischief.

1591 Mr. {Johnson.} Okay. Mr. Chandler?

1592 Mr. {Chandler.} Thank you. I think the FTC has the

1593 authority today to go after, for unfair business practices,

1594 the most egregious cases. The opportunity that you have on

1595 legislating on this is to set some very, very clear standards

1596 for what a demand letter to end-user or a small app developer

1597 would have to include so that you have an immediate step that

1598 the commission can take to try to demand transparency.

1599 So rather than creating a regulatory structure around

1600 the ultimate enforcement action for the underlying acts, by

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1601 making very clear what a demand letter has to have, I think  
1602 you stop automatically a lot of this activity, because these  
1603 entities that are doing this can't stand to have the sunshine  
1604 expose what is going on. And just setting that standard for  
1605 needs to be in the letter I think will go a long way toward  
1606 solving the problem itself.

1607 Mr. {Johnson.} Okay. Mr. Dixon, in your testimony you  
1608 distinguished between letters with allegations of  
1609 infringement seeking compensation, versus letters marketing  
1610 inventions, seeking investment.

1611 Mr. {Dixon.} Um-hum.

1612 Mr. {Johnson.} How are these letters different from  
1613 each other, and what do you say that distinguishes them? Or  
1614 what do the letters say that distinguishes them?

1615 Mr. {Dixon.} So I think this really gets back to the  
1616 business communications that we would have as a university.  
1617 When we are trying to market our technologies, we are trying  
1618 to incentivize investment. But oftentimes within these  
1619 letters, we are identifying intellectual property that we  
1620 own, and we are letting a company know that they may be  
1621 interested. For example, I have got a cancer vaccine. I

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1622 know Eli Lilly works in cancer. I am going to send them a  
1623 letter saying, would you be interested in developing this  
1624 technology? I think the major difference here is that patent  
1625 demand letters will contain the threats of litigation, and  
1626 often require that license.

1627 Now, as has been stated earlier, these trolls are very  
1628 bright, and so one of the things, I think, that will be  
1629 difficult is to craft the right legislation that will prevent  
1630 the troll-like activity, while not stopping these typical  
1631 business communications that are vital for us to continue on.  
1632 Because universities and companies need to send letters to  
1633 one another identifying potential IP that we might want to  
1634 cross-license, or develop together, we want to make sure that  
1635 that does not get caught in any sort of FTC regulation that  
1636 slows the pace of innovation and development.

1637 Mr. {Johnson.} Okay. All right. Mr. Skarvan, you  
1638 stated you want a safe harbor to preserve your rights to put  
1639 companies on notice. What is the difference between the  
1640 manner in which you communicate your patent rights, and the  
1641 manner in which a patent troll communicates his alleged  
1642 patent rights?

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1643           Mr. {Skarvan.} Well, I think there is a whole spectrum  
1644 of, again, using the word patent trolls, but maybe better  
1645 word in sum of this, of using the patent demand system, or  
1646 patent demand letter. I think any patent holder who is  
1647 engaging in good faith communications is entitled to those  
1648 safe harbor rights. When you start talking about an abuser,  
1649 and somebody that is acting in bad faith, objectively bad  
1650 faith, false statements, then that person is not entitled to  
1651 those safe harbor rights, because they are not acting in good  
1652 faith.

1653           And so the difference really isn't so much the label of  
1654 the person exercising the patent right, it is whether or not  
1655 they have engaged in this abusive behavior. Then they are  
1656 not entitled, because they have been acting in bad faith to  
1657 those, if you want to say good faith rights that everybody  
1658 has.

1659           Mr. {Johnson.} Okay. All right. Thank you, Mr.  
1660 Chairman. My time has expired.

1661           Mr. {Terry.} Thank you. Now recognize the gentleman  
1662 from Illinois, Mr. Kinzinger, for 5 minutes.

1663           Mr. {Kinzinger.} Well, thank you, Mr. Chairman, and

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1664 thanks for holding the hearing, and to all of you, thank you  
1665 for coming out. Especially nice to see the folks from CAT  
1666 here. It is a good home state company. I am grateful for  
1667 the panel's insight on these issues of the abusive patent  
1668 demand letters. In my office, we have heard from several  
1669 consumer groups, realtors, credit unions, and banks, and they  
1670 share a common message, which is patent demand letters are  
1671 often deceptive, confusing, and intimidating.

1672       It is certainly concerning that some entities are  
1673 purposely misusing patent demand letters. These tactics hurt  
1674 job creation, hinder innovation, and place a significant  
1675 financial toll on consumers, businesses, nonprofits, and  
1676 other actors within the economy. As we consider these  
1677 abusive tactics, as we have had a lot of discussion today, it  
1678 is important to keep in mind that demand letters do serve a  
1679 legitimate purpose in the patent system, and any reform  
1680 should ensure legal patent holders' rights are protected.  
1681 With these considerations in mind, I have a few questions I  
1682 would like to ask.

1683       I will start with Mr. Skarvan. You probably know the  
1684 Illinois bill better than I do, but could you tell me any

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1685 shortcomings that the Illinois bill has, and then where the  
1686 Federal government would have a role in, in essence, pouring  
1687 cement over that in order to protect the rights of companies?

1688           Mr. {Skarvan.} Shortcomings? I actually applaud  
1689 Illinois for coming up and crafting a compromised solution.

1690           Mr. {Kinzinger.} Well, I guess let me rephrase  
1691 shortcomings. Instead of saying where would you believe that  
1692 in Illinois the Federal government then would need to step in  
1693 after Illinois has done what it has done?

1694           Mr. {Skarvan.} Well, looking at the Illinois language,  
1695 if I am answering the question correctly, I would like to see  
1696 any Federal legislation, any rules put in place, to be  
1697 consistent with the Illinois language, because it, again, I  
1698 think everybody agrees it is those communications that are  
1699 sent widespread, you know, hundreds and thousands to the end-  
1700 users, that are clearly the abusive practices that people  
1701 seem to be keying in on. So that language in the Illinois, I  
1702 think, is pretty key, and I think people have mentioned that.  
1703 Definitional language is important to understand that. And  
1704 when questions have come up on the Illinois legislation  
1705 it is--

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1706 Mr. {Kinzinger.} Right.

1707 Mr. {Skarvan.} --usually around the definition of  
1708 consumer, and person, and, you know, not for resale type  
1709 language that is inherent in that bill.

1710 Mr. {Kinzinger.} So, then, for the whole panel, with  
1711 all your stakeholders, Illinois has its language, let us say  
1712 Pennsylvania comes up with its language, Iowa comes up with  
1713 its own, what is the concern with how you practice your  
1714 craft, in terms of states that have all kinds of different  
1715 languages not consistent with, for instance, Illinois, or no  
1716 Federal provision? We could start on the very left, sir, if  
1717 you want to go, if you guys have any thoughts on the varying  
1718 state proposals.

1719 Mr. {Sorrell.} The Vermont statute is for bad faith  
1720 assertions of patent infringement. I am not familiar with  
1721 the specifics of the Utah, Virginia, Oregon, and Wisconsin  
1722 laws, nor the others that are being considered. But to the  
1723 extent that the standard is bad faith, then I am not of the  
1724 view that companies that make good faith assertions of patent  
1725 infringement have a problem.

1726 Mr. {Kinzinger.} Okay.

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1727           Mr. {Brouillard.} Yeah. Clearly, I think, from our  
1728 point of view, patent law is Federal law. And so, as I  
1729 mentioned earlier, I think it is important that there not be  
1730 a hodgepodge of legislation at state level that starts to  
1731 countermand things that would be good practices for companies  
1732 that do operate on a multi-state, or multi-national basis,  
1733 such as we have heard today from Caterpillar, and Cisco, and  
1734 others.

1735           Mr. {Kinzinger.} Yeah. Mr. Skarvan, if you could talk  
1736 to specifically how it would affect your company if you have  
1737 varying state laws?

1738           Mr. {Skarvan.} Well, I actually asked that question  
1739 specifically with the folks in my group, and with that wide  
1740 variety, we literally have to have a spreadsheet to hang over  
1741 your desk, and understand what states cover what, and what  
1742 the penalties are. And, at the same time, you would have to  
1743 have an understanding of exactly what states are in play,  
1744 because, you know, many recipients in our line of business  
1745 are multifaceted state participants. In the end, I think it  
1746 would absolutely kill our ability to send out any  
1747 communication.

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1748           And I just wanted to reinforce, there isn't a magical  
1749   patent demand letter that suddenly appears at some point in  
1750   time in the conversation between business to business. It is  
1751   a series of communications where you are trying to invite  
1752   dialogue, and trying to address this issue, and get more  
1753   information, find out more, and move toward a solution, all  
1754   outside the court system.

1755           Mr. {Kinzinger.} Thanks. Thank you. And any of the  
1756   other three gentlemen, I only have 40 seconds, if any of you  
1757   three have anything to add, please do.

1758           Mr. {Dixon.} I had a really quick comment. I think one  
1759   of the dangers here is putting back on the states the  
1760   requirement of determining what is legitimate and who is  
1761   lying, because within this there is a pretty gray spectrum of  
1762   entities that are maybe stretching what their patent claims  
1763   may actually be, and so that is what the Federal Court system  
1764   is designed for. And I agree, the bad faith need to be taken  
1765   care of, but there becomes a gray zone, and we don't want the  
1766   state Attorney Generals having to do patent claim charts all  
1767   of a sudden.

1768           Mr. {Kinzinger.} Right.

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1769 Mr. {Dixon.} We want that done in Federal Court.

1770 Mr. {Kinzinger.} Okay. With that, Mr. Chairman, thank  
1771 you, I yield back.

1772 Mr. {Terry.} Thank you, Mr. Kinzinger, and we have no  
1773 other witnesses, so I have to do a little business here  
1774 before I can adjourn this. And so we have statements for the  
1775 record, and I ask unanimous consent to insert into the record  
1776 these papers and letters from Span Coalition, Credit Union  
1777 National Association, Independent Community Bankers of  
1778 America, National Association of Federal Credit Unions, and  
1779 National Retail Federation. This has been vetted on both  
1780 sides. So, hearing no objection, so ordered into the record.

1781 And I want to thank all of you for being here. It was a  
1782 very narrow, intellectual discussion, and I think it was a  
1783 really good discussion, and very helpful to us. And I really  
1784 appreciate all of your efforts and sacrifices to be here  
1785 today to help us now, as we will sit down and start figuring  
1786 out how to draft a bill. You are now adjourned. Thank you.

1787 [Whereupon, at 11:44 a.m., the Subcommittee was  
1788 adjourned.]